

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

4 UNITED STATES OF AMERICA,)
5) Case No. 1:18-CR-00140
6 Plaintiff,) (RJA) (HKS)
7)
8 vs.) June 26th, 2019
9)
DANIEL VILLAFANE-LOZADA,)
10)
Defendant.)

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE RICHARD J. ARCARA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JAMES P. KENNEDY, JR., ESQ.
UNITED STATES ATTORNEY
BY: JEREMY MURRAY, ESQ.
ASSISTANT UNITED STATES ATTORNEY
138 Delaware Avenue
Buffalo, NY 14202

For the Defendant: FEDERAL PUBLIC DEFENDER'S OFFICE
BY: JEFFREY BAGLEY, ESQ.
300 Pearl Street, Suite 200
Buffalo, NY 14202

Court Reporter: MEGAN E. PELKA, RPR
Robert H. Jackson Courthouse
2 Niagara Square
Buffalo, NY 14202

01:12PM 1 THE CLERK: Criminal action 2018-140A. United States
01:12PM 2 vs. Daniel Villafane-Lozada. Sentencing. Counsel, please
01:12PM 3 state your name and the party you represent for the record.

01:12PM 4 MR. MURRAY: Good afternoon, Your Honor. Jeremy
01:12PM 5 Murray on behalf of the United States.

01:12PM 6 MR. BAGLEY: Good evening, Judge. Jeffrey Bagley for
01:12PM 7 Mr. Villafane-Lozada.

01:12PM 8 THE COURT: Good afternoon. Sorry we're running a
01:12PM 9 little late here.

01:12PM 10 MR. BAGLEY: No problem, Judge.

01:12PM 11 THE COURT: Are we ready?

01:12PM 12 MR. BAGLEY: Yes.

01:12PM 13 THE COURT: Government is ready?

01:12PM 14 MR. MURRAY: Yes, Your Honor.

01:13PM 15 THE COURT: The defendant stands before the Court for
01:13PM 16 sentencing on his previous plea of guilty to one count of
01:13PM 17 possession of child pornography involving a prepubescent minor
01:13PM 18 in violation of Title 18, United States Code, Section
01:13PM 19 2252A(a)(5)(B) and 2252A(b)(2). I know counsel reviewed the
01:13PM 20 report. I assume, Mr. Bagley, you reviewed that with your
01:13PM 21 client?

01:13PM 22 MR. BAGLEY: Yes, Judge.

01:13PM 23 THE COURT: The Court hereby accepts the terms and
01:13PM 24 conditions of the plea agreement and the plea of guilty. I
01:13PM 25 will place the report in the record under seal. If an appeal

01:13PM 1 is filed, counsel on appeal will be permitted access to the
01:13PM 2 report, except counsel on appeal will not be permitted access
01:13PM 3 to the recommendation section.

01:13PM 4 The parties have filed the appropriate statement of
01:13PM 5 parties with respect to sentencing factors. There's no
01:13PM 6 dispute about the facts in the report and therefore, the Court
01:13PM 7 adopts those facts as its findings of fact and hereby
01:14PM 8 incorporates them into the record.

01:14PM 9 There are no objections to the probation officer's
01:14PM 10 conclusions as to the applicable guidelines. The Court
01:14PM 11 recommends that the defendant's base offense level under
01:14PM 12 Guideline Section 2G2.2(a)(1) is 18. The report also
01:14PM 13 recommends a two-level upward adjustment pursuant to Guideline
01:14PM 14 Section 2G2.2(b)(2), as the instant offense involved material
01:14PM 15 of a prepubescent minor under the age of 12.

01:14PM 16 The report also recommends a four-level upward
01:14PM 17 adjustment pursuant to 2G2.2(b)(4), as the offense involved
01:14PM 18 material that portrayed sexual abuse of an infant or a
01:14PM 19 toddler. The report also recommends a five-level upward
01:14PM 20 adjustment pursuant to 2G2.2(b)(5), as the defendant engaged
01:14PM 21 in a pattern of activity involving a sexual abuse of a minor.

01:14PM 22 The report also recommends a two-level upward
01:14PM 23 adjustment, pursuant to 2G2.2(b)(60, as the instant offense
01:15PM 24 involved the use of a computer. The report also recommends a
01:15PM 25 five-level upward adjustment pursuant to 2G2.2(b)(7)(D), as

01:15PM 1 the offense involved 600 or more images. The report also
01:15PM 2 recommends a two-level downward adjustment for acceptance of
01:15PM 3 responsibility and accordingly recommends the offense level
01:15PM 4 should be properly calculated at level 33, with a criminal
01:15PM 5 history category of I, with an advisory range of 135 to 168
01:15PM 6 months.

01:15PM 7 The statutory term of imprisonment is a maximum of
01:15PM 8 20 years. The advisory range for a supervised release is a
01:15PM 9 term of five years to life. The advisory range for a fine is
01:15PM 10 \$35,000 to \$250,000, plus the cost of imprisonment and
01:15PM 11 supervised release or community confinement or home
01:15PM 12 confinement and probation.

01:15PM 13 In accordance with the Supreme Court decision, *U.S.*
01:15PM 14 *v. Booker* and the Second Circuit decision, *U.S. v. Crosby*, the
01:16PM 15 Court must consider the guidelines, is not bound by them. The
01:16PM 16 Court must also consider the factors in 18 U.S.C. 3553(a).

01:16PM 17 Now, I have received six letters on behalf of the
01:16PM 18 defendant, some medical records and a sentencing memorandum on
01:16PM 19 behalf of the defendant, as well as a memorandum from the
01:16PM 20 government. I believe that pretty much sets forth the
01:16PM 21 parameters here. Mr. Bagley?

01:16PM 22 MR. BAGLEY: Thank you, Judge. I think there's two
01:16PM 23 questions in every sentencing that the Court and the public
01:16PM 24 want answered. Those two questions are: Why did the
01:16PM 25 defendant, my client in this case, Daniel, commit this crime?

01:16PM 1 And then, two, is he going to commit a crime like this again
01:16PM 2 in the future?

01:16PM 3 As I tried to explain in my memorandum as to why I
01:16PM 4 think he committed this crime, Daniel is not unlike many
01:16PM 5 clients of mine -- and I'm sure defendants before this Court
01:17PM 6 charged with and convicted of crimes like these -- in that he,
01:17PM 7 himself, was a victim of a similar crime when he was a young
01:17PM 8 man, when he was a boy, five years old.

01:17PM 9 And for whatever reason, Judge -- and I'm not a
01:17PM 10 psychologist -- I do quote from Dr. Heather Wood, who tries to
01:17PM 11 explain this, Judge, it does, for whatever reason, hardwire
01:17PM 12 the brain in some way to make it more likely that someone, a
01:17PM 13 victim of a crime, is going to be later on accused of a crime
01:17PM 14 and convicted of a crime like this, Judge.

01:17PM 15 And the sad thing about a lot of these cases, and
01:17PM 16 it's no different for Daniel, is that he's ashamed of it. He
01:17PM 17 doesn't tell anybody about it and so he doesn't get any
01:17PM 18 treatment for it. And so, he leads his whole life, as his mom
01:17PM 19 attests to -- he didn't even tell his own mother -- he leads
01:17PM 20 his whole life kind of unable to deal with it, unable to grasp
01:18PM 21 it, unable to fight back those demons, Judge, until now.

01:18PM 22 Until now.

01:18PM 23 And I've got about 200 pages of records from Niagara
01:18PM 24 County Jail. I cited some of them in my papers. And he's
01:18PM 25 seen probably once a month by Dr. Cervantes, a psychologist.

01:18PM 1 He's seen by nurses and mental health staff at the jail on
01:18PM 2 almost a day-to-day basis, especially at the beginning.
01:18PM 3 Judge, this case is about a year old, maybe a little bit
01:18PM 4 longer. And especially at the beginning, he saw these folks
01:18PM 5 on a near daily basis. And towards the end, Judge, that has
01:18PM 6 been cut back a little bit and I think it's because he's
01:18PM 7 starting to do a little better.

01:18PM 8 And so, Judge, I think that is part of the why and
01:18PM 9 part of the will he do it again. And Judge, I have seven -- I
01:18PM 10 have seven reasons that he's not going to, as I point out,
01:18PM 11 Judge. And the first of which is for Daniel and maybe it
01:19PM 12 could be arranged, depending on the case, Judge, and depending
01:19PM 13 on the defendant who is sitting in front of you, Judge, but
01:19PM 14 for Daniel, number one, is his remorse.

01:19PM 15 I think there's a heading that says, you know, his
01:19PM 16 remorse is such that he contemplated and tried to commit
01:19PM 17 suicide. So, I don't bring that up necessarily just because
01:19PM 18 I'm asking for your mercy or your sympathy for Daniel, but I
01:19PM 19 think it demonstrates that he does take this extremely
01:19PM 20 seriously.

01:19PM 21 From day one, from the time that I have met him, he's
01:19PM 22 admitted this conduct. He's admitted to the agents the minute
01:19PM 23 that they came and raided his house where he was living with
01:19PM 24 his boyfriend. He went out to Tim Horton's and had coffee and
01:19PM 25 lunch with them and walked them through every single thing in

01:19PM 1 his past because, you know, I think what happens is the guilt
01:20PM 2 and the remorse just came spilling out. And he has been that
01:20PM 3 way ever since in his interactions, not only with me, but also
01:20PM 4 with the staff.

01:20PM 5 And I think you can find that it's genuine, because
01:20PM 6 he doesn't know that I'm going to get the records and forward
01:20PM 7 them, attach them to my memorandum, records in which he says
01:20PM 8 to the nursing staff eight, ten months ago about how
01:20PM 9 remorseful he is, how guilty he is for having committed the
01:20PM 10 crimes he stands before you convicted of.

01:20PM 11 Judge, the second reason is the microscope. And he's
01:20PM 12 going to be on supervised release for a long period of time.
01:20PM 13 He's going to be in jail, detention, prison, most likely for a
01:20PM 14 long period of time, so he will be under a microscope for the
01:20PM 15 remainder of his life. And studies have shown that that
01:20PM 16 microscope, the certainty of being caught, is actually a
01:20PM 17 better deterrent than any kind of prison time. So, certainly
01:20PM 18 Daniel now knows there is absolutely zero chance that if he
01:21PM 19 ever re-offends in any kind of fashion, he's going to be going
01:21PM 20 back to jail for an extremely long time.

01:21PM 21 Age, Judge, is another big factor for Daniel. He was
01:21PM 22 22 years old at the time of the offense. He now stands before
01:21PM 23 you, he's 23 years old. And studies have shown -- I have
01:21PM 24 probably made the argument before this Court before -- that
01:21PM 25 the cerebral cortex, the part of the brain that is responsible

01:21PM 1 for decision making isn't fully formed, especially in males,
01:21PM 2 until the age of 25. Of course, that doesn't begin to excuse
01:21PM 3 any kind of conduct, but I think it does demonstrate that by
01:21PM 4 the time he gets released from prison, he's literally going to
01:21PM 5 be a different person. His brain is literally going to be
01:21PM 6 changed in that time.

01:21PM 7 The single best predictor, Judge, of a successful
01:21PM 8 release is, I think, two-fold. Number one is family and is he
01:21PM 9 going to have somewhere to go and some support system? And
01:22PM 10 the letters speak to that. I won't belabor that point.

01:22PM 11 And I think the other thing is his criminal history.
01:22PM 12 Folks with higher criminal histories tend to recidivate.
01:22PM 13 Folks with lower criminal histories tend not to, to put it
01:22PM 14 simply. Mr. Villafane-Lozada's criminal history is absolutely
01:22PM 15 zero. He's a criminal history category I. He's never been
01:22PM 16 convicted or even charged with anything in his entire life.

01:22PM 17 I talked about the rehab, about how he's been in
01:22PM 18 treatment, really, for this whole time at Niagara County Jail.
01:22PM 19 And that treatment will continue and be more robust in the
01:22PM 20 Bureau of Prisons. Judge, Daniel is young, he's intelligent.
01:22PM 21 He's not somebody who, when he gets out of prison -- and I can
01:22PM 22 say this with a fair amount of confidence -- I don't think you
01:22PM 23 are going to see Daniel on a supervised release violation. I
01:22PM 24 don't think you're going to -- Daniel is not going to be the
01:22PM 25 type of person who has no future and who cannot find a life

01:22PM 1 for himself.

01:22PM 2 Given his young age, given his intelligence, I am
01:23PM 3 confident that he will have a successful life at some point
01:23PM 4 when he's released from prison. And, obviously, this all goes
01:23PM 5 to the factors that I think something in the guideline range
01:23PM 6 is not necessary. It's a heck of a lot of time that these
01:23PM 7 guidelines recommend in cases like this and I am asking for a
01:23PM 8 below guideline sentence for those reasons.

01:23PM 9 And I'd also ask you to consider the collateral
01:23PM 10 consequences of his conviction, of his imprisonment. Courts
01:23PM 11 have said that these are valid concerns that could be taken
01:23PM 12 into account when considering the 3553(a) factors; the
01:23PM 13 psychological effects of imprisonment, the supervised release,
01:23PM 14 the fact that his liberty is going to be restricted for many,
01:23PM 15 many, many years to come. And I'd highlight and focus and
01:23PM 16 emphasize, Judge, the psychological effects for Daniel, which
01:23PM 17 are severe, very severe.

01:23PM 18 For those reasons, Judge, I would ask you to consider
01:24PM 19 a below guideline sentence in a case like this, given his age,
01:24PM 20 given his remorse, given the psychological effects and the
01:24PM 21 demonstrated remorse and mental health issues that Daniel has.

01:24PM 22 THE COURT: All right, sir. This is your opportunity
01:24PM 23 to say anything you'd like to say.

01:24PM 24 THE DEFENDANT: I'm sorry.

01:25PM 25 MR. BAGLEY: Judge, obviously, it's difficult for

01:25PM 1 Daniel to speak. I can kind of physically see the anxiety
01:25PM 2 building in him. He did write a letter to this Court, Judge,
01:26PM 3 and I'd ask you to consider that.

01:26PM 4 THE COURT: Anything on behalf of the government?

01:26PM 5 MR. MURRAY: Your Honor, as stated in the
01:26PM 6 government's response to defendant's sentencing memo, this is
01:26PM 7 not a run-of-the-mill ordinary possession of child pornography
01:26PM 8 case. The defendant's history and characteristics reveal that
01:26PM 9 he has sexual attraction to minors and that he engaged in
01:26PM 10 sexual contact with minors on numerous occasions throughout
01:26PM 11 his life.

01:26PM 12 THE COURT: Twice.

01:26PM 13 MR. MURRAY: On multiple occasions, Your Honor, yes.

01:26PM 14 He stated, during a polygraph examination, his
01:26PM 15 primary sexual interest were minor males approximately eight
01:26PM 16 years old. He engaged in sexual conduct with a 14-year-old
01:26PM 17 minor male when the defendant was 19 years of age. He engaged
01:26PM 18 in sexual contact with a 15-year-old minor male when he was 21
01:26PM 19 years old on numerous occasions. The defendant also admitted,
01:26PM 20 during the polygraph, that at one point, he planned to engage
01:26PM 21 in sexual contact with an eight-year-old male approximately
01:26PM 22 six months before his arrest.

01:26PM 23 But turning to the child pornography itself as well,
01:27PM 24 Your Honor, the defendant possessed images which revealed
01:27PM 25 sexual abuse of toddlers, such as an adult inserting his penis

01:27PM 1 into a three-year-old child's anus. The defendant's
01:27PM 2 possession of child pornography involving toddlers, in
01:27PM 3 combination with his plan to sexually abuse an eight-year-old
01:27PM 4 child, in combination with him saying that his sexual
01:27PM 5 preference is for eight-year-old children and the fact that he
01:27PM 6 did engage in actual hands-on sexual contact with two
01:27PM 7 identified minor victims that we're aware of, that does, in
01:27PM 8 fact, in the government's position, justify a guideline
01:27PM 9 section, respectively, in the higher end of the range.

01:27PM 10 The defendant -- the government takes the position,
01:27PM 11 respectfully, that he's a serious threat to the safety of the
01:27PM 12 public, minors in the community. The defendant's actions
01:27PM 13 harmed a number of victims, some of them known, some of them
01:27PM 14 unknown. And the defendant deserves, respectfully, a just
01:28PM 15 punishment for his actions which provide for adequate
01:28PM 16 deterrence. And the government submits that a sentence within
01:28PM 17 the higher end of the guideline range, as noted in our
01:28PM 18 response to the sentencing memorandum, is sufficient but not
01:28PM 19 greater than necessary to comply with the factors of 3553(a)
01:28PM 20 in this case.

01:28PM 21 THE COURT: Well, I have carefully read all the
01:28PM 22 pretrial reports, letters. I received medical reports and I
01:28PM 23 don't think there's any cases that a judge has for sentencing
01:28PM 24 that are more difficult than cases involving child
01:28PM 25 pornography. They are certainly up there in the category of

01:28PM 1 the most serious offenses. And it certainly seems to me that
01:28PM 2 that has to never be forgotten or ignored. And I certainly,
01:29PM 3 in this case here, there is a lot of information about his
01:29PM 4 activity.

01:29PM 5 Pursuant to the Sentencing Reform Act of 1984, the
01:29PM 6 judgement of the Court is that the defendant is hereby
01:29PM 7 committed to the custody of the Bureau of Prisons to be
01:29PM 8 imprisoned for a period of 120 months. Cost of incarceration
01:29PM 9 fee is waived. He shall forfeit his interest in the property
01:29PM 10 specifically set forth in section 7 of the plea agreement
01:29PM 11 incorporated herein.

01:29PM 12 Upon release, he shall be placed on supervised
01:29PM 13 release for a period of 10 years. He shall report in person
01:29PM 14 to the probation office in the district in which he is
01:29PM 15 released within 72 hours. He shall comply with the standard
01:29PM 16 conditions of supervised release adopted by the Court. He
01:29PM 17 shall not commit another federal, state or local crime. He
01:29PM 18 shall be prohibited from possessing a firearm or other
01:29PM 19 dangerous device. He shall not possess a controlled
01:29PM 20 substance. He shall cooperate with the collection of a DNA
01:29PM 21 sample, as required by the Justice For All Act of 2004.

01:29PM 22 Since the instant offense occurred after September
01:30PM 23 1994, but is not related to drug testing (sic), does not have
01:30PM 24 a history of substance abuse problems, the mandatory for drug
01:30PM 25 testing is waived.

01:30PM 1 He shall not use or possess any computer, data
01:30PM 2 storage device or any internet capable device unless the
01:30PM 3 defendant participates in the computer internet monitoring
01:30PM 4 program or unless authorized by the Court or the probation
01:30PM 5 office.

01:30PM 6 He must provide the U.S. Probation Office with
01:30PM 7 advanced notification of any computer or computers, automatic
01:30PM 8 service or services or connected device or devices that will
01:30PM 9 be used during the term of supervision. The probation officer
01:30PM 10 is authorized to install any application that is necessary to
01:30PM 11 surveil all activity on computer or computers or connected
01:30PM 12 device or devices owned by or operated by the defendant.

01:30PM 13 He shall be required to pay the cost of monitoring
01:30PM 14 services. The U.S. Probation Office shall be notified by
01:31PM 15 electric -- via electronic transmission of impermissible
01:31PM 16 suspicious activity or communications occurring on such
01:31PM 17 computer or connected device consistent with the computer
01:31PM 18 monitoring policy in effect by the probation office.

01:31PM 19 If triggered by impermissible or suspicious activity,
01:31PM 20 he shall consent to and cooperate with the unannounced
01:31PM 21 examinations of any computer equipment owned or used by the
01:31PM 22 defendant. Examinations shall include, but are not limited to
01:31PM 23 the retrieval and copying of all the matter from the computer
01:31PM 24 or computers connected to the device or devices, storage media
01:31PM 25 and any internal or external paraphernalia that may involve

01:31PM 1 removal of such equipment for the purpose of conducting a more
01:31PM 2 thorough inspection. Any such monitoring examination is
01:31PM 3 simply designed to avoid, as much as possible, bringing any
01:31PM 4 privileged information or any private material that is not
01:32PM 5 illegal or reasonably likely to lead to illegal material or
01:32PM 6 evidence related to illegal activity.

01:32PM 7 He shall participate in the sex offender specific
01:32PM 8 treatment program and follow the rules and regulations of the
01:32PM 9 program. The probation office will supervise the details of
01:32PM 10 the defendant's participation in a program, including the
01:32PM 11 selection of a provider and schedule. Defendant is not to
01:32PM 12 leave treatment until complete or is ordered by the Court. He
01:32PM 13 shall be required to contribute to the cost of services
01:32PM 14 rendered.

01:32PM 15 He shall not have any deliberate contact with any
01:32PM 16 child under 18 years of age, excluding his biological or
01:32PM 17 adopted children, unless approved by the probation officer or
01:32PM 18 by the Court. He shall not loiter within 100 feet of
01:32PM 19 schoolyards, playgrounds, arcades or other places primarily
01:32PM 20 used by children under the age of 18.

01:32PM 21 The probation office has the discretion to authorize
01:33PM 22 the defendant to pick up his children from school or other
01:33PM 23 functions. However, authorization must be obtained in advance
01:33PM 24 by the probation officer or, alternatively, from the Court.
01:33PM 25 He shall register with the state sex offender registration

01:33PM 1 agency in any state where he resides, is employed, carries out
01:33PM 2 a vocation or is a student and shall provide proof of the
01:33PM 3 registration to the probation officer.

01:33PM 4 The probation office is authorized to release the
01:33PM 5 defendant's presentence report to the New York State Board of
01:33PM 6 Examiners of Sex Offenders. Further disclosure to the county
01:33PM 7 court and to the parties involved in the determination of the
01:33PM 8 defendant's final classification level is also authorized.

01:33PM 9 Defendant shall submit to a search of his person,
01:33PM 10 property, vehicle, place of residence or any other property
01:33PM 11 under his control, based upon reasonable suspicion and permit
01:33PM 12 the confiscation of any evidence or contraband discovered.

01:34PM 13 He shall submit to a polygraph, computerized voice
01:34PM 14 stress analyzer, or any other such testing, not to exceed
01:34PM 15 twice in a calendar year, in addition of two retests per year
01:34PM 16 as needed. That testing may include examination using a
01:34PM 17 polygraph, computer voice stress analyzer or similar device to
01:34PM 18 obtain information necessary for supervision of the case
01:34PM 19 monitoring and treatment.

01:34PM 20 The defendant shall answer the questions posed during
01:34PM 21 the examination, subject to defendant's right to challenge, in
01:34PM 22 a court of law, the use of such statements as violations of
01:34PM 23 the defendant's Fifth Amendment rights. In this regard, he
01:34PM 24 will be deemed not to have waived his Fifth Amendment rights
01:34PM 25 by making any such statements. He's also -- results of any

01:34PM 1 polygraph pretest and polygraph examinations may be disclosed
01:35PM 2 to the U.S. Probation Office and the Court, but should not be
01:35PM 3 further disclosed without a court order. The defendant is
01:35PM 4 required to contribute to the costs of services rendered.

01:35PM 5 He shall participate in the mental health treatment
01:35PM 6 program including mental health evaluation and any treatment
01:35PM 7 recommended. The probation officer will supervise the details
01:35PM 8 of any testing and treatment, including the selection of a
01:35PM 9 provider and schedule if inpatient treatment is recommended,
01:35PM 10 however, it must be approved by the Court unless the defendant
01:35PM 11 consents. He is not to leave such treatment until completion
01:35PM 12 or is ordered by the Court.

01:35PM 13 While in treatment or taking any psychotropic
01:35PM 14 medication, he shall abstain from the use of alcohol. He'll
01:35PM 15 be required to contribute to the cost of services rendered.
01:35PM 16 He shall submit to a search of his person, property, vehicle,
01:35PM 17 place of residence or any other property under his control,
01:35PM 18 based upon reasonable suspicion, and permit the confiscation
01:35PM 19 of any evidence or contraband discovered.

01:35PM 20 The Court finds the defendant is indigent and cannot
01:36PM 21 afford the mandatory \$5,000 Justice For Victims of Trafficking
01:36PM 22 Act of 2015 assessment. However, I will order the mandatory
01:36PM 23 special assessment of \$100, which is due immediately. Payment
01:36PM 24 shall begin under the Bureau of Prisons Inmate Financial
01:36PM 25 Responsibility Program.

01:36PM 1 While he is in prison, I will recommend that he be --
01:36PM 2 receive mental health treatment, including a mental health
01:36PM 3 evaluation and any treatment that is determined that he needs
01:36PM 4 while he is incarcerated.

01:36PM 5 The reasons for the sentence. In determining the
01:36PM 6 sentence, the Court has considered the advisory range and the
01:36PM 7 points raised by counsel and the defendant and I have
01:36PM 8 carefully considered the factors in 18 U.S.C. 3553(a) and find
01:36PM 9 the sentence imposed is sufficient, but not greater than
01:36PM 10 necessary to comply with the purposes of sentencing set forth
01:36PM 11 in 18 U.S.C. 3553(a). I have given a variance here. I went
01:37PM 12 to 120 months versus 133 months. I believe -- I feel, in this
01:37PM 13 case here, I know the government asked for a higher end of the
01:37PM 14 guideline range. I don't think that's necessary here.

01:37PM 15 He's a young man. He's -- he has no prior record,
01:37PM 16 appears to be very remorseful. He admitted his involvement in
01:37PM 17 this activity almost immediately. He was very candid and the
01:37PM 18 information has been very helpful. I think the information
01:37PM 19 that has been provided, much of the information he provided
01:37PM 20 during the polygraph, which is kind of unusual for somebody to
01:37PM 21 go through a polygraph examination.

01:37PM 22 But the information that the government's alluded to
01:37PM 23 and that the Court is aware of that's in the report came from
01:37PM 24 him directly. And I feel that that is very, very important,
01:37PM 25 particularly in the event that mental health treatment is

01:37PM 1 necessary. I do not like to hold that information against an
01:38PM 2 individual. I feel it's more helpful, for purposes of
01:38PM 3 rehabilitation and treatment, and will go a long way in
01:38PM 4 helping him deal with these demons that he has to deal with,
01:38PM 5 which I think is very, very unfortunate. And the fact that he
01:38PM 6 did that, I feel that a sentence a little below the guideline
01:38PM 7 range is a fair and reasonable sentence.

01:38PM 8 You have a right to appeal the sentence, sir, if you
01:38PM 9 feel the Court misapprehended its authority or imposed an
01:38PM 10 illegal sentence. However, you did waive your right to
01:38PM 11 appeal. If you feel that waiver is not a valid waiver, you
01:38PM 12 may take that issue before the Second Circuit Court of
01:38PM 13 Appeals. Anything further?

01:38PM 14 MR. MURRAY: Your Honor, just as far as the
01:38PM 15 forfeiture is concerned, as contained in the forfeiture
01:38PM 16 section of the plea agreement and the preliminary order of
01:38PM 17 forfeiture, the identified assets will be forfeited to the
01:38PM 18 United States with the final Order of Forfeiture.

01:39PM 19 THE COURT: Is there an order somewhere?

01:39PM 20 MR. MURRAY: Yes, Your Honor.

01:39PM 21 THE COURT: Do I have it here?

01:39PM 22 Denise, do I have the order?

01:39PM 23 THE CLERK: They usually send it after sentencing.

01:39PM 24 THE COURT: Provide the order to me and I'll sign it.

01:39PM 25 MR. MURRAY: Yes, Your Honor. Thank you. With that,

01:39PM 1 the government would dismiss the open counts in the
01:39PM 2 indictment, Counts 1 and 3 of the indictment.

01:39PM 3 THE COURT: Counts what?

01:39PM 4 MR. MURRAY: One and three.

01:39PM 5 THE COURT: All right. He pleaded guilty to Count 2?

01:39PM 6 MR. MURRAY: That's correct, Your Honor.

01:39PM 7 THE COURT: Okay. Motion is granted.

01:39PM 8 MR. MURRAY: Thank you.

01:39PM 9 MR. BAGLEY: Judge, I'm sorry. If I may, can I be
01:39PM 10 heard on one thing? I do -- as you know, Judge, it's the
01:39PM 11 conditions are kind of a hot topic in the Second Circuit. I
01:39PM 12 know there's a few issues that are pending on appeal. So,
01:39PM 13 just to preserve the record, I would just like to note an
01:39PM 14 objection to a few of the conditions of supervision.

01:39PM 15 THE COURT: Such as?

01:39PM 16 MR. BAGLEY: So, I have four, Judge, that I'd like to
01:39PM 17 note; the sex offender treatment. Judge, we're objecting to
01:40PM 18 that, specifically on the basis of it being unnecessarily
01:40PM 19 vague in the sense that the probation officer supervises the
01:40PM 20 details of the supervision. And Judge, I'm sorry, this comes
01:40PM 21 from the appeal unit, so please don't hold me personally
01:40PM 22 responsible for this. So, the objection there, Judge, is
01:40PM 23 apparently in other cases, probation officers have sat in on
01:40PM 24 treatment. And we think that that, you know, impairs the
01:40PM 25 ability of the treatment that, you know, the client to be

01:40PM 1 candid during treatment. And because it's kind of vague, we'd
01:40PM 2 object to it on that basis.

01:40PM 3 THE COURT: All right. That objection is noted.

01:40PM 4 MR. BAGLEY: Thank you, Judge. I do have a few
01:40PM 5 others, Judge. I'm sorry. I can list them if you want and I
01:40PM 6 won't explain them necessarily.

01:40PM 7 THE COURT: All right.

01:40PM 8 MR. BAGLEY: So, the computer internet, the fact that
01:40PM 9 Mr. Villafane-Lozada was required to pay the entire cost of
01:41PM 10 it. He's indigent and that could infringe on his First
01:41PM 11 Amendment rights. The computer internet monitoring program is
01:41PM 12 what I'm speaking of, Judge.

01:41PM 13 Then the notification of risk, Judge, is a now a new
01:41PM 14 standard condition. We'd argue that that still improperly
01:41PM 15 delegates power to probation.

01:41PM 16 And finally, the polygraph provision, Judge. Not
01:41PM 17 exactly the polygraph, but the part in the polygraph that
01:41PM 18 allows probation to use the voice stress analyzer and then the
01:41PM 19 next section says or any similar device, Judge. So, we'd
01:41PM 20 object to that.

01:41PM 21 THE COURT: All right. Objection is noted. Court
01:41PM 22 will be in recess.

01:41PM 23 THE CLERK: All rise.

01:42PM 24 (Proceedings ended at 1:42 p.m.)

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3 I certify that the foregoing is a
4 correct transcription of the proceedings
5 recorded by me in this matter.

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9 s/ Megan E. Pelka, RPR

10 Court Reporter,

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